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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 14

JAMES BUCK, TRUSTEE UNDER THE WILL OF JOB M. NASH, DECEASED, *Plaintiff in Error,*

v.

WILLIAM E. BEACH, TREASURER OF TIPPECANOE COUNTY, INDIANA, *In Error to the Supreme Court of the State of Indiana.*

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Of Counsel.

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v.

WILLIAM E. BEACH, TREASURER OF TIPPECANOE COUNTY, INDIANA, *In Error to the Supreme Court of the State of Indiana.*

I.

PLEADINGS.

This case is here on a writ of error to the Supreme Court of the State of Indiana to review its decision affirming the judgment of the Circuit Court of Warren county sustaining an assessment of taxes made by the auditor of Tippecanoe county, in that state.

The predecessor in office of the defendant in error as treasurer of Tippecanoe county in 1897 brought the action set out in the record against the plaintiff in error

in the Circuit Court of Tippecanoe county to enforce the payment of taxes; the venue was changed to the Warren Circuit Court, where the case was tried and determined.

The complaint sets up that there were unpaid taxes on the tax duplicates of Tippecanoe county against the estate of Job M. Nash, assessed in 1894 on personal property of Nash, that he had omitted to return for taxation during the years 1881 to 1893, both inclusive. That Nash's will had been probated in Ohio where the executors were qualified, and that they had failed to pay the taxes. That by the terms of the will a trust was created and the trust fund was given to James Buck, the plaintiff in error, of Lafayette, Indiana, and William A. Goodman, of Ohio, to invest and pay the net income to certain persons; that the trustees received the trust fund which was in the hands of Buck, in Lafayette, and by him invested according to the will.

That the trustees in August, 1895, filed their complaint in the Tippecanoe Circuit Court to restrain the treasurer of that county from the collection of the taxes; that a demurrer was filed to that complaint and sustained; that they appealed to the Supreme Court, where the judgment was affirmed; that the executors had removed the personal property of the estate of Nash from the state of Indiana, except the property of the trust, which was the only property the treasurer was able to find on which to levy to pay the taxes. That Buck, as trustee, had in his hands $268,000.00, and the treasurer had requested him to pay the taxes and that he had refused, and then demanded trust property to levy on for that purpose and the said trustee also refused. The prayer was for a disclosure by the trustee of the trust property and delivery of sufficient amount thereof to the treasurer to be by him disposed of to pay the taxes.

It is only necessary to particularly notice the counter-claim of the plaintiff in error. Rec., pages 57, 95.

It averred that Nash died testate July 19, 1893, and was at his death, and had been continuously for more than fifteen years before, a citizen of and domiciled in the state of New York; the probate of his will, the appointment of and qualification of his executors, the creation of a trust fund vested in the plaintiff in error, of Lafayette, Indiana, and William A. Goodman, of Ohio, their qualification, the property of the trust fund and the term of the trust.

That all the real estate, chattels or tangible personal property of which Nash had been the owner in Indiana, had been duly returned for taxes in Tippecanoe county, that all taxes were paid, that the estate of Nash in Indiana had been returned and assessed and the taxes paid, that the trust fund or property of the trust in Indiana had been assessed and all taxes thereon had been paid.

That the auditor of Tippecanoe county, on May 7, 1895, placed on the tax duplicate and assessed the property which it was claimed Nash had owned and omitted to return for taxation during each of the years 1881 to 1893, inclusive, and set out their value. That the property consisted exclusively of stocks, bonds, promissory notes and mortgages securing them. That all the notes and mortgages assessed were either executed by citizens of Ohio or Indiana; those made in Ohio were payable in and secured by mortgage on lands in Ohio, and those made in Indiana were payable in Indiana and were secured by mortgages on lands in that state, and for convenience the notes made in Ohio are called Ohio notes and those made in Indiana are called Indiana notes, and the said bonds and stocks were called foreign bonds and stocks, and had been issued by corporations organized under the laws of other states than Indiana and were

payable in Cincinnati, Ohio, where they had been kept, that none of them had ever been in Indiana or used in any business in that state.

That the Ohio notes, bonds and stocks had been assessed for taxation in Ohio and no taxes remained unpaid thereon in that state; that Ohio notes, which had been in Indiana, had been kept there for safety and convenience, and not otherwise, and they had not been, nor had any of them at any time ever been transferred, pledged, assigned or used in whole or in part in any form or manner in any business whatever, in Indiana, during the life of Nash; that all payments on account of interest or principal, of any of the Ohio notes, had been made in Ohio, and all money so paid, on account of principal or interest, had been deposited and kept in the state of Ohio, and no part thereof had been transmitted to Indiana. That Nash became the owner of all of the Ohio notes, foreign bonds and stocks in the state of Ohio, by purchase, or the loan or the investment of his money in the state of Ohio and in no instance in the state of Indiana.

The averments show that certain Ohio notes had not been in Indiana for all of said years. That the Indiana notes during the years 1881 to 1893, both inclusive, had been returned for taxation in Tippecanoe county and all taxes there had been paid, with certain exceptions, and that the taxes, interest and penalties thereon were tendered, and the tender was brought into court. That the trustee had in his possession in Tippecanoe county a portion of said trust property, that the said treasurer had the duplicate for collection, and would collect said alleged taxes out of the same unless restrained.

That the making of said assessment by said auditor was done by virtue of the power created by the state of Indiana by statute, entitled "An act concerning taxation,

repealing all laws in conflict therewith, and declaring an emergency." Approved March 6, 1891. That the said treasurer and auditor were officers of the state of Indiana and authorized to assess property for taxation in Tippecanoe county for the use of said state and county and place and assess property for taxation on the tax duplicates and the treasurer was empowered to collect the same; and the auditor in assessing said taxes and placing them on the duplicate acted in behalf of the state of Indiana, and the treasurer in enforcing the payment of them was likewise acting for said state; that there was no statute of Indiana authorizing the auditor or treasurer to subject the said trust property to the payment of assessed taxes.

That the collection of the taxes out of the trust property by the state of Indiana would be a taking of that property without due process of law and would deny the trustee the equal protection of the laws in violation of the 14th article of the constitution of the United States.

The prayer was for judgment declaring the assessment illegal as against the trustee and his trust property and its vacation, and that the treasurer and his successor in office be enjoined from enforcing the collection of the taxes against the trustee and the trust property.

There was a general denial to the counterclaim.

II.

Facts.

The facts in evidence are not in controversy and show that Job M. Nash, the payee was a resident citizen of New York during all the time in question; that from 1865 to his death in July, 1893, he had uninterruptedly loaned, collected and re-loaned and invested his money

in Cincinnati, Hamilton county, Ohio, through his sole agent in Ohio, who was a resident of that state. That the borrowers were resident citizens of Ohio and made their promissory notes, dated and payable in Cincinnati, Ohio, to Nash, secured by mortgages on lands exclusively in Hamilton county, Ohio; these notes are known throughout the records as Ohio notes; all renewals of any of these notes and all payments on account thereof were made with and to his agent in Cincinnati, where all moneys so paid were deposited in bank in Cincinnati to the credit of Nash, and no part thereof was sent to Indiana.

In 1868 Nash commenced loaning money through brokers in Lafayette, Tippecanoe county, Indiana. In 1879 he had, in course of his loaning business, acquired some real estate in that state and appointed an agent there to take care of it; in 1879 to 1886 he was engaged in winding up his Indiana affairs through this agent, and for that purpose he, in 1882, secured an office room for the transaction of this business, although in this interval a few loans were made. In 1886 this agent's power was enlarged to loaning and collecting and re-loaning Nash's money at Lafayette and he was his sole agent in Indiana, and remained such until Nash's death. The Indiana loans were made in Lafayette and were evidenced by notes of the borrowers, who were citizens of Indiana, secured by mortgages on lands wholly in Indiana, and were made payable to Nash, and all collections on account thereof were deposited in a bank to the payee's credit. These notes were known in the records as Indiana notes.

Prior to the winter of 1883-4 no Ohio notes had at any time been in Indiana, but Ohio notes were in Indiana during a portion of each of the years from the winter of 1883-4 to July 19, 1893, inclusive. Shortly before the Ohio notes were sent to Indiana from Ohio

Nash was desirous of knowing if his Ohio agent was crediting him in his Cincinnati bank account with all collections of the Ohio notes; for this purpose he directed the Ohio agent to transmit to the Indiana agent a memorandum of, or the Ohio notes themselves, so that the Indiana agent could make a memorandum of them in a book or register in Lafayette, to enable the Indiana agent to know and inform Nash if Nash's Cincinnati pass book showed all collections which were due on Ohio notes. Accordingly, in the winter of 1883-4, and thereafter until Nash's death, from time to time the Ohio agent sent Ohio notes to the Indiana agent, with instructions to return to him every month such of them as became due in the following month; and thereafter the Indiana agent returned such Ohio notes to the Cincinnati agent as directed, from month to month, for payment or renewal, and at any other time returned said Ohio notes when directed by said Ohio agent. Whenever Ohio notes were received from or returned to the Ohio agent by the Indiana agent, and whenever payment or renewals of such notes were reported by the Ohio agent to the Indiana agent he made entries of the facts in the register kept by him, and whenever they were received they were placed by the Indiana agent in a safe in his office, to which he alone had access, and there they always remained until taken out for transmission to Ohio. No person ever had possession or custody of any of the Ohio notes in Indiana, except said Indiana agent and the postal or express agents for the purpose of transmission as stated.

None of the Ohio notes were in Indiana April 1st, of any of the years 1887 to 1893, inclusive. During the years 1881 to 1893, inclusive, the statute of Indiana fixed the first day of April of each year as the day for assessment for taxes on all property taxable in the state.

Some time before April 1, 1887, Nash directed his Indiana agent to send to him at Cincinnati, in care of his Ohio agent or banker, all Ohio notes in Indiana some time before the first day of April. In obedience to this order the Indiana agent sent to Cincinnati, Ohio, all the Ohio notes in Indiana to the address of Nash, as directed, a short time before the first day of April of each of the years 1887 to 1893, both inclusive. A short time after the first of April of each of those years the Ohio notes sent to Nash the month before were returned to the Indiana agent at Lafayette, when they were again placed in the safe. Memoranda were made in the register of the facts of the transmission, or the return of them, and thereafter they were kept and treated in the way hereinbefore described.

All Ohio notes and Indiana notes were sent to Ohio in August, 1893, after Nash's death.

Nash died testate, his will was probated in Cincinnati; by it a trust was created of which his Ohio agent, William A. Goodman, of Cincinnati, and James Buck, his Indiana agent, of Lafayette, plaintiff in error, qualified as trustees. The trust fund consisted of Ohio and Indiana notes and bonds, in all $268,000.00. The trustees apportioned the trust fund between them for convenience of administration, and Buck transferred one portion to Lafayette for that purpose.

In May, 1895, the auditor of Tippecanoe county placed and assessed on the tax duplicate for each of the years 1881 to 1893, both inclusive, personal property of the aggregate value of more than $7,000,000.00, as omitted property of Nash, in the name of Nash's estate, his executors and Buck, trustee, consisting exclusively of the Ohio notes and Indiana notes, dated, made payable as before stated, and bonds made by foreign corporations which had never been in Indiana. The assessment was

the par value of each dollar of the principal of each of them. The treasurer had custody of the duplicate for collection.

On the issue joined and agreement of parties as to the scope of the issues there was a trial by the court and a finding and judgment for the defendant in error over a motion for a new trial, in the sum of $36,257.71 on the assessment of certain of the Ohio notes; and a finding and judgment for the plaintiff in error setting aside the assessment on the foreign bonds and Indiana notes, and ordering the plaintiff in error to pay the judgment in sixty days or deliver to the defendant in error sufficient trust funds to satisfy the same.

The only reason for a new trial necessary to notice here was that the finding and decision was contrary to law.

An appeal was taken to the Supreme Court of Indiana, where the assignment of error relied upon was, that the court below erred in overruling the motion for a new trial and the judgment was affirmed.

The case is here on a writ of error to the Supreme Court of Indiana.

III.

THE ASSIGNMENT OF ERRORS RELIED ON.

(Transcript, p. 1078, etc.)

The trial court, being the Warren Circuit Court of the state of Indiana, erred in overruling the motion of the plaintiff in error, James Buck, trustee, for a new trial, and in rendering the judgment and decree against him, as is shown in said record; and the Supreme Court of Indiana erred in affirming the judgment and decree in said cause for the following reasons:

First. Because it appears in the evidence in said cause

that all the time said taxes, for which said judgment was rendered, accrued, said testator, Job M. Nash, was at all times a resident and citizen of New York; that said items of property so taxed, being the Ohio notes and nothing else, were never used or invested in any business in Indiana, nor had they arisen out of any business or investment in Indiana, but were actually and permanently invested in business in Ohio during all of said time, and were never in Indiana during any part of said time except at times for safe-keeping and convenience; and therefore

(b) It is also a violation of the rights of the plaintiff in error, under section one of article fourteen of said constitution of the United States, in that it takes, or attempts to take, the property of plaintiff in error, and his said testator without due process of law in that it is an attempt to assess, levy and collect taxes on property not subject to taxation in the state of Indiana.

(c) And it is a violation of the same section one of article fourteen in that it denies to the said plaintiff in error and his said testator the equal protection of the laws, and gives to an inhabitant, resident and citizen of Indiana, an immunity from taxation denied to an inhabitant, resident and citizen of New York.

IV.

ARGUMENT.

FEDERAL QUESTIONS.

The counterclaim of the plaintiff in error specially set up and claimed that the taxes were assessed under the provisions of the statute of Indiana entitled "An act concerning taxation, repealing all laws in conflict there-

with and declaring an emergency," approved March 6, 1891, and charged that the auditor was authorized to place and assess on his tax duplicate taxable property which had been omitted therefrom, and the county treasurer was authorized to enforce the collection of the taxes.

That in making the assessment of the taxes in question, the auditor and the treasurer, the defendant in error, in enforcing their collection, were acting for the state of Indiana; that there was no statute of Indiana authorizing them to subject the trust property of the plaintiff in error to payment of the taxes; that the collection of them out of the trust property was a taking of the trust property without due process of law, and denied the plaintiff in error the equal protection of the laws, contrary to the fourteenth article of the constitution of the United States.

Rec., pp. 94, 95.

The grounds of the federal questions are:

First. That the physical presence of the Ohio notes in Indiana did not constitute taxable property there, because they were given and payable in another state by non-residents to a non-resident, for loans made in Ohio, where they were paid, and had never been used in business in Indiana.

Second. That all of the Ohio notes, covered by the assessment for each of the years 1887 to 1893, both inclusive, were in Ohio on the first day of April of each of those years, and since by the statute of Indiana taxes were only assessable on personal property owned, or held, possessed or controlled on the first day of April of each year; that the assessment for all of these years, amounting to $32,954.98 of the total assessment of $36,257.71, was void, because the payee and makers of the notes were non-residents, the notes themselves and the owing

or debt property were without the state of Indiana, and thus there was no person or thing whatever within the power or jurisdiction of Indiana to tax.

Third. The statute of the state of Indiana concerning taxation expressly excluded from taxable personal property the property of an inhabitant actually and permanently invested in business in another state; that the assessment of taxes on the Ohio notes was a taxation of the personal property of Nash invested in an actual and permanent business in Ohio, and the decision of the Supreme Court of Indiana, that the assessment and collection of the taxes were valid, was a denial of the equal protection of the laws, and deprives the plaintiff in error of his trust property without due process of law.

ARGUMENT ON MERITS.

The presence of the Ohio notes in Indiana did not constitute taxable property in that state.

The powers of taxation of a state are uncontrollable except as restrained by the provisions of the federal constitution.

McCullough v. *State of Maryland*, 4 Wheaton 316, 418, 428, 429.

These powers can only be exercised over persons, property and business within the jurisdiction of the state.

State Tax on Foreign-Held Bonds, 15 Wall. 300, 319;

Dewey v. *Des Moines*, 173 U. S. 193, 204;

Louisville & J. Ferry Co. v. *Kentucky*, 188 U. S. 385, 396, 397, 398.

The powers of taxation are solely vested in the law-making department of the state.

Section 1, Article 10, Constitution of Indiana, Revised Statute of 1881.

There must be statutory warrant for taxation.

New Orleans v. *Stempel*, 175 U. S. 309, 312.

There was no statute of Indiana concerning the taxation of the transfer of property by death or otherwise; or, the taxing of title papers or written instruments themselves, apart and distinguished from the property interests or rights to which they related, or by which they were evidenced; or, on account of the business of loaning, collecting, reloaning or investment of money in the state.

The important parts of the tax laws of Indiana, in force when the assessment was made, are these:

Sec. 1. "The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

Sec. 1 of Art. 10, Constitution of Indiana, Revised Stat. of 1881, pp. 28, 29.

Sec. 1. "Be it enacted by the general assembly of the state of Indiana, that all taxes for the support of the government of this state shall be assessed on polls and on property listed and valued in an equal and ratable proportion (except such stocks and other property as may be specifically taxed) in the following manner, namely: The amount necessary and proper to be charged on each poll and on each hundred dollars' worth of property, for state expenditures and for school purposes, shall, from time to time, be fixed by law; and the amount to be charged

on each poll and on each one hundred dollars' worth of property for county expenditures shall be determined by the board of county commissioners at their annual meeting in September."

Sec. 3. "All property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Acts of 1891, p. 199.

Sec. 4. "For the purpose of taxation, real property shall include all lands within the state and all buildings and fixtures thereon and appurtenances thereto, excepting in cases otherwise expressly provided by law; personal property shall include all goods and chattels within the state, all ships, boats and vessels belonging to inhabitants of this state, whether at home or abroad, and their appurtenances; all goods, chattels and effects belonging to inhabitants of this state, situate without this state, except the property actually and permanently invested in business in another state shall not be included; all indebtedness due to inhabitants of this state above the amounts respectively owed by them, whether such indebtedness is due from individuals or corporations, public or private, and whether such debtors reside within or without the state; all shares in corporations organized under the laws of this state, when the property of such corporation is not exempt or is not taxable to the corporation itself; all shares in banks organized in this state under any law of the United States, but in estimating the value of such shares deduction shall be made of the value of all real estate taxed to the bank, all shares in foreign corporations except national banks, owned by inhabitants of this state; all moneys; all circulating notes of national bank associations and United States legal tender notes and other notes and certificates of the United States, payable on demand, and circulating or intended to circulate as currency; all annuities and royalties; all interests owned by individuals in lands, the fee of which is in this state or in the United States, except as hereinafter provided. Property exempted from taxation by the laws of the

United States shall not be included. Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholders. Lands sold by the state, including lands forfeited to the sinking funds, the university funds and all other trust funds, though not granted or conveyed, shall be assessed in the same manner as if actually conveyed. All lands reserved to or for any individual by any treaty between the United States and any Indian tribe or nation shall be liable to taxation from the time such treaty shall have been confirmed."

Acts of 1895, p. 22.

"On the first day of April of each year, or as soon thereafter as practicable, and before the first day of June, the assessor shall call upon each person required by this act to be assessed, and furnish him or her with the proper blanks for the purpose, and thereupon such person shall make to such assessor a full and correct description of all personal property, of which such person was the owner on the first day of April of the current year, and such person shall, also, at the same time, make separate, full and true statements in like manner, in writing, distinctly setting forth in each a correct description of all personal property held, possessed or controlled by him as executor, administrator, guardian, trustee, receiver partner, agent, attorney, president or accounting officer of a corporation, consignee, pawnbroker, or in any representative or fiduciary capacity, and he shall fix what he deems the true cash value thereof to each item of property for the guidance of such assessor, who shall determine and settle the value of each item, after examination of such statement, and also an examination under oath of the party or of any other person, if he deems it necessary. In determining and settling such valuation, he shall be governed by what is the true cash value, such being the market or usual selling price at the place where the property shall be at the time of its liability to assessment, and if there be no market value, then the actual value.

"In making the valuation, annuities and royalties shall be valued at their present cash value. For the purpose

of making such statements, the person to be assessed shall receive the proper blanks from the assessor."

Sec. 48, Acts of 1895, pp. 210, 211.

"The constitution requires that property, wealth, substantial value shall be taxed, not imaginary values."

Florer v. *Sheridan*, 137 Ind. 28, 42.

Such property must not only be within the terms of the tax law, but also in the case of a non-resident it must be within the territorial limits of the taxing state.

The ascertainment of the domicile of Nash and the borrower of the money, the properties created by or arising out of the contract of Nash and the borrower, and their localities and the effect, if any, of the execution of the Ohio notes, and their location, will determine the question, whether the assessment was on any taxable property in Indiana, and also whether the taxing of the trust property would be without due process of law.

The following important facts and conclusions from facts on both sides of the case are correct, we believe:

1. That from January 1, 1881, until his death, July 19, 1893, the testator, Job. M. Nash, was continuously a resident and inhabitant of, and domiciled in the city, county and state of New York. Rec., p. 134 and p. 1055.

2. That during the same period Nash was continuously engaged in the business of loaning, collecting, reloaning and investing his money in Cincinnati, Hamilton county, Ohio, by his agent, resident of that place. Rec., p. 1055 and p. 155.

3. That the borrowers of the money so loaned were citizens and inhabitants of Cincinnati, and they severally made and delivered their promissory notes, secured by mortgages, on lands wholly located in Hamilton county, to Nash, dated and payable to him in Cincinnati. Rec., pp. 154, 155, 652, 658 and 697.

4. That all these notes were paid, and the money so paid, during Nash's lifetime, was deposited to his credit and kept in Cincinnati. Rec., pp. 157, 158, 1[illegible] and 1003.

5. That Nash had an agent in Lafayette, Indiana, during the year 1883 and thereafter until his death, to take care of his lands in Indiana, and to loan, collect and reloan his money in that state, and for that purpose he rented an office room for the use of the agent.

6. That by Nash's direction the Ohio notes and mortgages were sent by the Ohio agent to the Indiana agent before the first day of April, in the year of 1884, and from time to time thereafter during the following years until his death, and by like direction the Indiana agent was to make memoranda of their contents in a book to be kept by him and return monthly any of them falling due in the following month to the Ohio agent for collection, who was to notify the Indiana agent if they were paid, and if any of them were renewed, to send them back to the Indiana agent, who was to make notes of these facts in the book, and that the agents executed these orders.

That all transmissions of the notes and mortgages were by mail or express, and while the notes, etc., were in Lafayette they were kept by the Indiana agent in a locked safe in his office, and no one else had any access to them, and no one had possession of any of them in Indiana except the Indiana agent and the postal and express agents for transmission, and that this was all that was done with the Ohio notes or mortgages in Indiana.

7. That no Ohio note or mortgage had ever been sold, assigned, transferred or pledged, nor had any of them ever been used in any business in Indiana.

8. That the Ohio notes and mortgages in Indiana, at the time of the death of Nash, were sent to Cincinnati to his executor.

THE CONSEQUENCE OF THIS GROUP OF FACTS IS:

1. That Nash had no taxable property in Indiana.

(a) *The properties of the lender and their situs.*

When Nash loaned his money to the borrowers he had the moral and legal right to have it back, and no one else had, because no one else loaned it.

This right was a legal personal attribute of Nash, and thus it was impalpable to any of our senses and so intangible, and therefore, incapable of occupying any other place than in his person, and, consequently, it must have been wherever he might have been, and its permanent *situs* must have been where his permanent abode was, and at his domicil in New York.

So the acts of the parties in lending and borrowing and the law, and no other things, created this right. This right being thus independent of and apart from any other facts, the making of memoranda or notes of the transaction, or of any part of it, were immaterial things to the creation or existence of the right.

In Story on Conflict of Laws it is said, in section 399, that "a debt is not a *corpus* capable of a local position, but purely a *jus incorporale*," and in section 362 "that contracts respecting personal property and debts are now universally treated as having no *situs* or locality, and they follow the person of the owner in point of right, although the remedy on them must be according to the law of the place where they are sought to be enforced."

This right to have his money back was taxable property, in the legal sense of the word, because it was itself convertible into money or valuable things by its owner, and its *situs* being in New York, and within the power of that state, it was taxable there if the tax laws thereof had included it.

Kirtland v. *Hotchkiss*, 100 U. S. 491.

It was without the jurisdiction of Indiana, and, therefore, not taxable there.

(b) *The equitable interest of Nash in the property of the borrowers and its situs.*

When Nash loaned his money, he invested it with the borrowers and it became a part of their property in Ohio, and having a right to a return of an equivalent out of this property, the borrowers were under a corresponding obligation to make such return to Nash, and to that extent they were also under obligation to own and hold their property in good faith, subject to such equitable right or interest of Nash. The borrowers were, in a limited degree, in equity the trustees of this property for Nash, who could have, in certain circumstances, interfered to preserve it, or have it sequestered, or a sufficient portion of it, under well-understood conditions, could have been seized to satisfy his right or the claim of his creditors, and it was taxable as his property in the state where it was, if the tax statutes thereof defined it as such, as the cases hereafter cited show. Its *situs* was at the place of the investment or at the domicil of the debtor in Ohio, and not being in Indiana, it was not taxable property there.

(c) *The obligations of the borrowers of Nash's money were to return it to him, and they were personal to them, because no one else received the loans, and also on account of their express promise to pay.*

These promises or obligations being inseparable from the borrowers, they were intangible and were where the borrowers were, and their permanent *siti* were at the domicil of the borrowers in Ohio. The *situs* of the mortgaged lands was likewise in Ohio, and, therefore, not taxable in Indiana.

Thus it appears that only two taxable properties were acquired by Nash, his chose in action and the equitable interest or security in the property owned by the borrower, the owing property owed to him.

(d) *The Ohio notes being only payable to Nash, they themselves, as they were, were not taxable property.*

The notes were not the loaned or borrowed money, not the owing money or property; nor the right of action of Nash; nor the obligation of the note makers; nor could they have changed the location of either of them or the domicils of the payee or payors, because they were fixed alone by other and antecedent facts and the law; nor did they create the right of action or the obligations, because they were created solely by the consequence of the acts of the parties in borrowing and lending and by the law; nor could they have given or taken away any value to the debtor-creditor property, because its value was adjusted by its nature, location and the desire of purchasers to have it; nor did they themselves have any intrinsic worth or value in money or as evidence, because their value or usefulness depended on the extraneous facts of the existence of the owing property available for the satisfaction of the debt owned by Nash, or, in other words, on the solvency or insolvency of the note makers, and, in case of their solvency, they were worthless for any purpose and nobody would have wanted them, or would have had them.

The right of action of Nash could have been transferred independently of the debtors, and while they remained in Indiana, in New York by a court of competent jurisdiction for good cause, or by Nash by his voluntary act, and a recovery could have been maintained on the actual contract, evidenced in part by the notes, while they were in Indiana or had been destroyed, and so, their existence or

whereabouts, or custody, were not the controlling and essential things, because they were merely evidence of them that could have been supplied by other evidence.

They could not have determined the forum in which to recover the owing property, because that was fixed by the facts of the residence of the debtors or the *situs* of the owing property.

The Ohio laws were, the Indiana laws were not, a part of them and the remedies to enforce the obligations to Nash would have been in Ohio, so, while they were in Indiana, there was no power in that state to enforce the transfer of Nash's right of action or the payment of the debt, because the creditors, debtors and owing property were in other states or jurisdictions. An actual seizure and sale of the notes, on any pretense in any procedure in Indiana, could not have involved any taxable property of Nash, and would have been futile.

The soundness of this position is sustained and is well illustrated in the case of *Owen* v. *Miller,* 10 Ohio Stat. 136, a case approved by this court in *Wyman* v. *Halstead,* 109 U. S. 654 and 656.

It appeared that the plaintiff Owen, being the owner of a farm in Ohio, where he was a resident, sold and conveyed it to a resident also of that state. The vendee executed his promissory notes payable to the order of the vendor, and secured them by a mortgage on the land sold, and thereupon the vendor removed to New Jersey to live, and took with him the notes and mortgage. Some time after he became indebted in New Jersey and then removed from that state, leaving, however, the purchase money notes and mortgage there. His creditors then commenced attachment proceedings against him in New Jersey as an absconding debtor, and the notes were seized and sold. There was no process served on the absconding debtor, except by publication of notice.

The transferee of the sold notes sold and delivered them to the vendee, who gave his notes secured by a mortgage on the farm to him. The holder of the last notes foreclosed his mortgage, the farm was sold and conveyed to Miller, the defendant. Afterward Owen brought his suit to recover the farm on the ground that his mortgage had become absolute and he was entitled to its possession, and that the New Jersey sale had not divested him of his property.

It was a question whether or not the sale of the notes was a sale of the plaintiff's property created by the contract, evidenced by the notes. The court said:

"It is a fundamental principle that no man is to be deprived of his property without his consent or by due process of law. To constitute due process of law, and make it effectual to change the title to property, there must be jurisdiction over the person of the owner, or over his property. We are brought, then, to the simple question whether the promissory notes given for a debt, being in New Jersey, and the makers of the notes, or the debtors, residing in Ohio, the property was in New Jersey or in Ohio? In substance, there is a sum of money in the hands of one man to which another has title or claim, and the evidence of that title or claim is a promise in writing to pay the money. Upon principle, it would seem clear that the subject-matter to which the title or claim relates is the property, and not the evidence showing the title or claim. This question has arisen in cases involving the jurisdiction to grant administration or letters testamentary. Of all such cases it has been said: 'As to the locality of many descriptions of effects, household and movable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and title to property, it was established as law that judgment debts were assets, for the purpose of jurisdiction, where the judgment is recorded; leases where the land lies; specialty debts where the instrument happens to be;

simple contract debts where the debtor resides at the time of the testator's death; and it was also decided that, as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidence of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found.' *Attorney-General* v. *Bowens*, 4 M. & W. 171-191. The payee of a promissory note has a property vested in him, but it is in action, not in possession. 2 Bla. Com. 468. It consists in the contract of the maker, and this contract has been said to differ from other contracts in two important particulars: *First*, it is assignable, whereas a chose in action at common law is not; and, *second*, the instrument itself gives a right of action, for it is presumed to be given for value, and no value need be alleged as a consideration for it. *Foster* v. *Dawber*, 6 Exch. 839, 853. This difference may lead to the idea that there is property in the evidence of the contract; but really the contract constitutes the property —it is property in action. The thing in action has peculiarities which distinguish it from other things in action, but it is still, in law, a thing in action. The effect of a seizure of a note under process of law can gain no force from the rules of the commercial law, which rules are only intended to regulate the right of parties depending upon their voluntary acts and agreements. A seizure of a note payable to bearer, or indorsed in blank, would not constitute the officer an indorsee or holder in the commercial sense of those terms. The officer would hold under the statute giving him the authority to seize, and not by contract. He would have the rights which that statute gave, and not those of an indorsee, or holder, in the usual course of business. It might happen that a subsequent holder of a note payable to bearer, or indorsed in blank, seized by an officer and put in circulation, would have the right to enforce its payment. But it would be upon the same principle that a note of like description, lost or stolen, might be a valid claim in the hands of an innocent holder. No such principle applies in this case. The notes were payable to order, and not indorsed by the payee, but were assigned by a writing on the notes in such a way as

to show clearly the origin of the title. In accordance with these views, we feel bound to come to the conclusion that the proceedings in attachment in New Jersey have not divested the plaintiff of the right to recover the debt due to him from a resident in this state, and secured by a mortgage upon the property in this state." (143, 144, 145.)

(e) *The Ohio notes had not been assigned or transferred, and being payable to Nash they were not taxable property in Indiana, because they had no value capable of being estimated in money.*

Taxes on property in Indiana are only imposed on property having a computable value in money, according to its market value, if any, and if not, its actual value at the place of taxation in the state. (Section 1, article 10 of the constitution of Indiana, and section 48 of the tax laws of that state heretofore in this brief set out.)

As said before, there was no Indiana statute taxing instruments of writing themselves, apart from the rights or interest to which they related or by which they are evidenced.

Nash being a non-resident, his right of action had its *situs* at his domicil in New York, the *situs* of the property owing him was where the investment of his money was made or at the domicil of his debtors in Ohio; and so both of these properties were without the jurisdiction of Indiana and were not taxable there.

The inquiry, then, is reduced simply to the taxability of the physical elements of the notes themselves. If they were in the hands of any holder, untransferred by Nash, he could not have collected the principal or interest evidenced by them, because they belonged to Nash, a fact which the notes showed, and, therefore, they would have been worthless to such holder, and without any value for

any purpose to him or any one in the world except Nash, either as evidence or otherwise.

While the state of Indiana might have forcibly seized the possession of them or might have transferred their possession to another, still that state could not have, by any exercise of its powers in any form or for any purpose, transferred to itself nor validated a transfer of them to another, so as to divest Nash of his right to receive or collect his owing property in Ohio, because he, the debtors and the owing properties were without its jurisdiction, and such transferee would, at most, only have had evidence that those properties belonged to Nash.

It is clear, it seems, that the notes themselves, as they were, had no taxable value.

The amount of the assessment was the sum of all the dollars mentioned on the face of the notes and was manifestly on purely imaginary property in Indiana, and therefore void. Rec., p. 696.

It might to be true that the notes were concrete as evidence, but to infer or say that they were concrete and thereby tangible taxable property is simply a delusive and perverted use of language in a case embracing only the facts and law applicable thereto, as in the principal one, and denotes a want of sufficient recognition of the taxable properties, which were created by the contracts, and the proper function and value of the note as mere evidence.

Calling fanciful or imaginary property actual property will not alter the facts, or make that taxable property which is not essentially such.

Statutes and cases show that there are only two taxable properties in a case of a note or bond.

They are the right of the payee to have his money returned, and the owing money or property; that the first is only taxable at the domicil of the payee, and the

second, in case the payee is a non-resident of the state where the debt property is.

The first proposition is illustrated by the case of *Kirtland* v. *Hotchkiss*, 100 U. S. 491.

There was a suit by Kirtland, a resident citizen of Connecticut, to restrain the collection of taxes assessed in that state on his ownership of a bond, which was made and payable to him in Illinois, where it was. The taxes were held valid. The Connecticut statute provided that personal property within or without the state, including money, credits, choses in action, bonds, notes, stocks and notes, being the property of any person resident in the state, should be valued and assessed at its just and true value, in the tax list of the town where the owner resided.

The court said:

"Plainly, therefore, our only duty is to inquire whether the constitution prohibits a state from taxing in the hands of one of its resident citizens a debt held by him upon a resident of another state, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the state in which the debtor resides."

"The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt is property in his hands, constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow citizens of the same state, to contribute for the support of the government, whose protection he enjoys."

"That debt, although a species of intangible property, may for purposes of taxation, if not for all others, be regarded as situated at the domicil of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains.

(498.) Whether the state of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make, by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the constitution and laws of the United States), is a matter which concerns only the people of that state, with which the federal government can not rightly interfere." (499.)

(2) That the creditor has some monetary interests in the property of his debtor has been recognized by the law, as is shown by the remedies provided by it to appropriate that property for his use long before it became a taxable subject. The remedies against a debtor's property to convert it into money to be given to the creditor show, it seems, two things: that the state declares thereby that the creditor has an interest in the debtor's property and has a right to have it in possession, and that the power of the state will take, by force, enough of that property to give to the creditor as will satisfy his right or claim to it. The remedies are various and adapted to all conceivable kinds of property in whomsoever's possession or under whatever circumstances it may be; as, by judgment, execution, taxation, garnishment, proceedings supplementary to execution, by bills in equity and in cases of founding administration.

That the creditor has a substantial interest measurable in money in the debtor's property, it would seem, is a part of the common law of the land, and is a basis depended upon in the daily conduct of all public and private business affairs. It is relied upon as a private right and enforceable by the state as a security for reimbursement.

Necessarily these remedies are only available in a state having power over the owing property; and in this case

they were all in Ohio, where the debtors and property were. There was, therefore, no power in Indiana to reach the property; it had no possible available remedies for that purpose.

In *Blake* v. *Williams*, 6 Pick. 285, 314, a citizen of Massachusetts drew a bill of exchange upon a banker in England, who paid it and had not been reimbursed; the banker was declared a bankrupt and there was an assignment of his effects. The plaintiff, also a citizen of Massachusetts, was a creditor of the bankrupt and summoned the drawer of the bill as trustee. The agent of the assignee in bankruptcy had demanded payment of the drawee. The question was whether the drawer was liable to the plaintiff.

The court said in the course of its opinion:

"But the relation of debtor and creditor, and the rights of the latter over the effects of the former, are distinct objects of jurisprudence within the control of the legislative power of the country where the property is. This power is absolute and uncontrollable; it may be unreasonably exercised, but still it is legal, if so willed by a sovereign independent power, for the dominion is here."

In *Bragg* v. *Gaynor and others*, — Wis. —; 21 L. R. A. 161, 166, there was a bill to collect a judgment against Gaynor, a non-resident, out of a sum of money due him from the resident and appealing defendants. The notes and mortgages evidencing the debt were in Illinois.

The court said:

"For all such purposes, these debts would have been regarded as property in this state, and subject to the jurisdiction of its courts, although both Gaynor and Witherwax were non-residents. Such result would not

have been considered in conflict with the general rule that the *situs* of personal property is, for many purposes, such as taxation, succession and distribution, regarded as having its locality at the domicil of the owner. By force of statute law, as well as public policy declared thereby and in the decisions of the courts, the *situs* or place where these debts are considered to be with reference to jurisdiction of our courts over them for the purpose of subjecting them to the satisfaction of debts due to a resident of this state from a non-resident in order to protect, do justice to, and satisfy creditors resident here, is that of such resident debtor owing the same. The right to so reach and appropriate such debts for such purposes has been affirmed by numerous adjudications from the earliest period, and it is too late now to attempt to maintain the proposition that for all purposes the *situs* of debts so sought to be reached and applied is at the domicil of such non-residents. They are to be regarded, for the purposes of such proceedings, as property abiding or being in the domicil of the party owing them, and are as much subject to the jurisdiction and control of our courts as tangible property of a non-resident found within our jurisdiction. It can not be disputed that tangible property so situated could be seized and applied to the satisfaction of the debts of a non-resident; and it is equally clear, as it seems to us, that debts, things in action, as distinguished from things in possession may be subjected to the equitable jurisdiction of our courts for the same purpose. The process of garnishment operates as an attachment, and fastens on such debts a lien by which they are brought under the dominion and jurisdiction of the court.

In *Catlin* v. *The Wilcox Silver-Plate Company*, 123 Ind. 477, 483, a partnership located in Chicago owned money due it from Indiana residents. A creditor's bill was filed in Chicago, a receiver was appointed and a deed of assignment was executed by the partnership by order of court. Subsequently a creditor of the firm garnisheed, in Indiana, money owing to the partnership from a resi-

dent of that state. The receiver intervened and set up the assignment to him and claimed the right to the money. The court held that the money was actually located in Indiana and that the Illinois court had no jurisdiction over it, and said:

"While it is true, as has been remarked before, the domicil of the owner, in legal contemplation, draws to it his personal estate, wherever it may be, yet as this is so only by fiction of law, the rule is not of universal application. When, by the laws and policy of the state where the property is actually located, it is subject to the process of attachment or garnishment, at the suit of a domestic or other creditor, the fiction yields, and the actual *situs* of the property determines whether or not it should be subjected to the process of court. *Warner* v. *Jaffray, supra; Green* v. *Van Buskirk, supra.* In cases of attachment and garnishment, like those for founding administration, the *situs* of a debt is the residence of the debtor. *Wyman* v. *Halstead*, 109 U. S. 654; *Owen* v. *Miller*, 10 Ohio St. 136."

Nor were there any remedies in Indiana applicable to the circumstances of the Ohio notes, because they themselves were not deemed property in Indiana. Supposing that there had been a judgment of record in Tippecanoe county against Nash, and the only things he had in Indiana were the notes, in the custody of his Indiana agent. They could not have been seized on execution. The law provided that:

676. "There shall be three kinds of executions—one against the property of the judgment debtor, one against his person, and one for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same; and executions may be issued to the sheriffs of different counties at the same time; but the plaintiff shall pay the costs upon all executions not

necessary to the collection of this judgment." Revised Statutes of 1881.

724. "Any debt or thing in action, legally or equitably assignable, may be levied upon, when given up by the defendant, and sold on execution, in the same manner as other personal property." Revised Statutes of 1881.

725. "The sheriff making the sale of any such debt or thing in action shall assign and deliver the same to the purchaser, and the assignment shall have the same effect as if made by the execution-defendant at the time of making the levy thereon, and shall be treated as so made." Revised Statutes of 1881.

The notes could not have been taken on a writ of attachment.

918. "Upon the filing of such affidavit and written undertaking, in the office of the clerk, he shall issue an order of attachment, which shall be directed and delivered to the sheriff. It shall require him to seize and take into his possession the property of the defendant in his county not exempt from execution." Revised Statutes of 1881.

921. "The sheriff shall proceed with the assistance of a disinterested and credible householder of the county, to attach the lands and tenements, goods and chattels of the defendant subject to execution, and shall, with the assistance of the householder, make an inventory and appraisement thereof, and return the same with the order." Revised Statutes of 1881.

Garnishment could not have been sustained because the debtors were in Ohio, and the notes in the possession of Nash's Indiana agent were not subject to execution, and the holder of the notes was not indebted to Nash.

931. "If, at the time an order of attachment issues, or at any time before or afterwards, the plaintiff, or other persons in his behalf, shall file with the clerk an affidavit that he has good reason to believe that any person, nam-

ing him, has property of the defendant of any description in his possession, or under his control, which the sheriff can not attach by virtue of such order; or that such person is indebted to the defendant, or has the control or agency of any property, moneys, credits or effects; or that the defendant has any shares or interest in the stock of any association or corporation,—the clerk shall issue a summons notifying such person, corporation, or association to appear at the ensuing term of the court, and answer as garnishee in the action. The summons shall be directed to the sheriff, and served and returned by him in the same manner as a summons is served and returned in other cases. When the summons issues before an attachment, the affidavit must show some one of the causes authorizing the attachment." Revised Statutes of 1881.

932. "From the day of the service of the summons the garnishee shall be accountable to the plaintiff in the action for the amount of the money, property, or credits in his hands, or due and owing from him to the defendant." Revised Statutes of 1881.

938. "If the plaintiff recover judgment against the defendant, and the garnishee deliver up to the sheriff, before judgment against him, all the defendant's goods and chattels, or other effects in his possession subject to execution, or an inventory thereof, and pay to the sheriff or into court all moneys due from him or belonging to the defendant, the costs of the proceeding against the garnishee shall be paid by the defendant." Revised Statutes of 1881.

Sargeant v. *Leland*, 2 Vt. 280.

The supposed conditions presented no case to which proceedings supplementary to execution were applicable. So, the Ohio notes in Indiana were not themselves considered property, except as evidence.

If Nash had died intestate, leaving an unsatisfied judgment of record, and also the Ohio notes in the custody of his agent in Tippecanoe county, as supposed, neither the notes nor the judgment would have been assets in Indiana.

The only part of the statute of Indiana relevant to decedent's estates and pertinent here is "where, not being an inhabitant of this state, he leaves assets." Sec. 2228 Rev. Stat. 1881.

In *Wyman* v. *Halstead*, 109 U. S. 654, 656, the evidence of money due from the United States to a decedent, then late of Tennessee, was in Washington. Letters of administration had been granted in Washington and at the domicil of the deceased. There was a question as to whom of the administrators the money was to be paid. The court said:

"The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicil of the debtor, and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable. *Yoemans* v. *Bradshaw*, Carth. 373; S. C. Comb, 392; Holt, 42; 3 Salk, 70, 164; *Abinger, C. B., in Attorney-General* v. *Bouwens*, 4 M. & W. 171, 191; S. C. 1 Horn & Hurlstone, 319, 324; Parke, B., in *Mondel* v. Steele, 1 Dowl. (N. S.) 155, 157; *Slocum* v. *Sanford*, 2 Conn. 533; *Chapman* v. *Fish*, 6 Hill 554; *Owen* v. *Miller*, 10 Ohio St. 136; *Pinney* v. *McGregory*, 102 Mass. 186.

In *Swancy* v. *Scott*, 9 Humph. 326, 332, 333, it appeared that a judgment had been recovered in an action brought in Kentucky, where both of the parties resided. Afterward, the judgment defendant, Swancy, became domiciled in Tennessee, and the judgment plaintiff, Brown, died, and letters of administration on Brown's estate were issued in Tennessee at the place of the domicil of Swancy. Then action of debt was brought on the judgment by the administrator against the judgment defendant in Tennessee. It became a question whether the action could be sustained.

The court said:

"The general proposition, asserted in some of the books, that a judgment is assets at the place where rendered or recorded, and a bond, where it happens to be found, necessarily implies that the bond or judgment-debtor is within the jurisdiction. And thus understood, it is only true in reference to the question of the jurisdiction of the ordinary; in all other respects the proposition is not only incorrect, but likewise absurd.

"The mere paper or parchment upon which the bond is written, or judgment recorded, is nothing more in reality than the evidence of a debt, and, in the hands of the administrator, is not of itself regarded as assets. He is not chargeable with a debt due to the deceased by bond or judgment any more than with a simple contract debt, (333) unless the money due thereon has actually been received. Until the reception of the proceeds of the bond or judgment he incurs no liability to creditors or other persons in the absence of negligence or maladministration.

"The common-sense doctrine is that a judgment or specialty debt, like simple contract debts, is assets where the debtor resides; and such, indeed, for all practical purposes is the established law of this day."

The case before the court presents the anomalous condition of taxation of things which could not have been taken and turned into money by any known process of the state, and if there had been a remedy by which they could have been seized and sold the sale would not have been productive of anything of value and would have been void by the law of Ohio, where the owing property was.

Owen v. *Miller*, cited above.

Statutes and authorities concerning taxation in cases of money loaned by and owing to a non-resident.

When a lender of his money places it in another state than that of his domicil he puts it within its territorial

boundaries, and, therefore, under the dominion of that state. Although the loaned property is owned by the borrower it is, nevertheless, owed to the lender and, thereby, the latter has an interest in the debtor's property to the extent of his loan; and this interest is of such definite and substantial nature, by force of law, as to constitute taxable property in the state where the money is invested, independent of any other fact there done or possible to be done by the borrower or lender, so long as the loan is outstanding. This particular sort of property is the only basis, and not, therefore, the evidence of it, which supports taxation in cases of loans made by non-residents.

The taxing state having the power to tax such property, because it is within its jurisdiction, it may do so or not at its pleasure, and therefore it can prescribe when or in what circumstances or conditions it may be taxed, as, that it may be taxed when it is shown by some written obligation or concrete evidence, or that it has arisen out of a course of business done in the taxing state, and may be assessed under the head or name of the note or other evidence of the investment, or that it may be taxed when secured by a mortgage on real estate in the taxing state, all, in such instances, as distinguished from simple debts like book accounts.

These are incidents or collateral matters apart from the thing actually taxed. They are signs when the taxing power may be exercised over property apt for taxation; they are not necessary; they are deemed to be merely expedient to the exercise of a power which could tax owing property of any sort, as book accounts of a non-resident.

This feature was noticed in the opinion in *New Orleans* v. *Stempel*, 175 U. S. 309, 315, 316, a case of taxation of a non-resident owning property in the state of Louisiana. Mr. Justice Brewer there said:

"The last case to which our attention has been called is that of *Liverpool, etc., Insurance Company* v. *Board of Assessors,* 51 La. Ann., p. —, 25 S. 970. In that case the court reaffirmed its prior rulings that 'a debt due to a non-resident (still in non-concrete form) has its *situs* at the domicil of the creditor, and not at the domicil of the debtor,' and therefore is not subject to taxation by the State which is the latter's domicil. At the same time it observed, in its discussion of the question, that the law requiring debts to be assessed for taxation "was intended for all such debts as are evidenced by notes or by mortgage, or that are in such other concrete form as to render it possible to subject them to taxation under the present laws. No attempt has been made since the cited decisions were rendered to localize 'debts' or 'open accounts' such as those upon which the taxes are now claimed."

The use of the terms debit or credit in a too restricted sense and of expressions seeming to mean that notes are themselves the taxable property apart from the property owing to the non-residents, has led sometimes to the belief that such was the correct view, as in the case under review.

Nevertheless, the decisions in the cases upon the point show that the only ground of such taxation is the owing property of the non-resident in the taxing state, as it must be, to be valid, and thus avoid constitutional objections.

There are statutes in some states providing for a levy on and sale of notes. Such levy and sale would only be effective in case of a resident owner, because it has jurisdiction over him, his notes and rights to them; but, where the owner of the notes is a non-resident and he has no owing property, there would be a want of power and the sale would be void, and, therefore, cases of that sort are not applicable to the circumstances of the facts in the principal case.

There are also statutes providing that a resident shall be taxed on account of his right to owing property abroad or at his home; instances of this kind are likewise

inapplicable, because the taxing state has power over the resident creditor, his rights and property wherever they may be; whereas, the contrary is true as to the facts in this case.

If in matter of taxation there are any authorities turning upon the difference between sealed and unsealed instruments they are not, we believe, controlling in this case, because, the distinction between them had been long abolished by the statutes of the state of Indiana and Ohio, except where it is otherwise provided by law.

1 Giauque's Revised Statutes of Ohio, section 4, and section 450 Revised Statutes of Indiana 1881.

The following cited cases decide the point, that in case of a non-resident the money due him, in the taxing state, is the only subject of taxation, and not his paper evidence.

Catlin v. *Hull*, 21 Vt. 152 ——— (1849);

Board v. *Davenport*, 40 Ill. 197, 200, 209 (1886);

Goldgart v. *People*, 106 Ill. 25, 27, 28, 29 (1883);

In re Jefferson, 35 Minn. 215, 218, 219, 220, 221 (1886);

Fitch v. *York County*, 19 Neb. 50, 51, 54 (1886);

Savings & Loan Society v. *Multnomah County*, 169 U. S. 422, 423, 424, 425, 426, 427 (1898);

New Orleans v. *Stempel*, 175 U. S. 309, 312, 313, 316 (1899);

Bristol v. *Washington County*, 177 U. S. 133, 141, 142 (1900).

Assuming now that it has been shown that Nash, his

debtors and owing property were without the jurisdiction of the state of Indiana, and that the physical presence of the Ohio notes did not constitute taxable property in that state, the taxes assessed on them were without just foundation and are illegal, and therefore, the state of Indiana would, by enforcing the collection of them by its officers, deprive the plaintiff in error of his trust property, without due process of law, and, the decision of the Supreme Court of that state is contrary to section 1 of article xiv of the constitution of the United States and should be reversed.

2. All the Ohio notes were without the state of Indiana during the first day of April of each of the years 1887, 1888, 1889, 1890, 1891, 1892 and 1893, and the taxes assessed on them are illegal, because, by the laws of the state of Indiana, taxable personal property owned, held or controlled on the first day of April of each year was only to be listed and valued for taxation, and, therefore, that state had no jurisdiction of said notes, and having no power over Nash or his owing property, the taxes are void.

The parts of the statute of that state relevant to or bearing upon the subject are these:

"On the first day of April of each year, or as soon thereafter as practicable, and before the first day of June, the Assessor shall call upon each person required by this act to be assessed, and furnish him or her with the proper blanks for the purpose; and, thereupon, such person shall make to such Assessor a full and correct description of all the personal property of which such person was the owner on the first day of April of the current year. Such persons shall, also, at the same time, make separate, full and true statements, in like manner, in writing, distinctly setting forth in each a correct description of all the personal property held, possessed, or controlled by him as executor, administrator, guardian, trustee, receiver, partner, agent, attorney, presi-

dent or accounting officer of a corporation, consignee, pawnbroker, or in any representative or fiduciary capacity; and he shall affix what he deems the fair cash value thereof to each item of personal property, for the guidance of such Assessor, who shall determine and settle the value of each item, after examination of such statement, and, also, an examination, under oath, of the party, if he deem it necessary, or he may adopt the valuation of the party. In determining and settling such valuation, the Assessor shall be governed by what is the fair cash value, such being the market or usual selling price at the place where the property shall be at the time of its liability to assessment; and if there be no market value, then the actual value. In making the valuation, annuities and royalties shall be valued at their present cash value. For the purpose of making such statements, he shall receive the proper blanks from the Asesssor.

S. 6330, Rev. Stat. of 1881.

"On the first day of April of each year, or as soon thereafter as practicable, and before the first day of June the Assessor shall call upon each person required by this act to be assessed, and furnish him or her with the proper blanks for the purpose, and thereupon such person shall make to such Assessor a full and correct description of all the personal property of which such person was the owner on the first day of April of the current year, and such person shall, also, at the same time, make separate, full and true statements in like manner, in writing, distinctly setting forth in each a correct description of all the personal property held, possessed, or controlled by him as executor, administrator, guardian, trustee, receiver, partner, agent, attorney, president or accounting officer of a corporation, consignee, pawnbroker, or in any representative or fiduciary capacity, and he shall fix what he deems the true cash value thereof to each item of property for the guidance of such Assessor, who shall determine and settle the value of each item, after examination of such statement, and also an examination under oath of the party or of any other person, if he deems it necessary. In determining and settling such valuation, he shall be governed by what is the true cash value, such being the market or usual selling price at the place where the property shall be at the time of its liability to assessment, and if there is no market value, then the actual value. In making the valuation, annuities and royalties shall be valued at their present cash value. For the purpose of making such statements,

the person to be assessed shall receive the proper blanks from the Assessor."

S. 48 Acts of 1891, pp. 210, 211.

Sec. 8. "Personal property shall be listed for taxation between the first day of April and the first day of June, each year, and with reference to the quantity and quality held or owned on the first day of April, in the year for which the property is required to be listed."

Sec. 9. "The person purchasing or acquiring property, whether real or personal, on the first day of April, in any year, shall be considered as the owner on that day and shall be assessed and liable for the taxes of that year."

Sec. 10. "If the person die after the first day of April, in any year, without having given in the amount of his taxables, his executor or administrator, heir at law, or other person having charge thereof, shall give in the same as though such property had been in his possession on the first day of April of such year."

Sec. 11. "All personal property shall be assessed to the owner in the township, town or city, of which he is an inhabitant on the first day of April of the year for which the assessment is made, with the following exceptions." Acts 1891, p. 201.

Sec. 20. "The personal property of persons removing from one county, township, town or city to another, between the first day of April and the first day of June, in any year, shall be listed and assessed in either place in which the owner is first called upon by the Assessor. The owner of personal property moving into this State from another State, between the first day of April and the first day of June, in any year, shall be listed for his poll and the property owned by him on the first day of April of such year, in the county, township, town or city into which he has so removed. *Provided*, That if such person has been assessed, and shall make it appear to the Assessor by the certificate of the proper authority in the place of his former residence, that he is held for tax for the current year in such former place of residence, he shall not again be assessed for such year. In case of doubt as to the proper place to assess personal property, if the doubt arises as to different townships in the county, the Auditor shall determine the place; and if the doubt arises as to different counties, the Auditor of State shall determine, such determination shall be summary and final."

S. 20, Acts of 1891, p. 204.
S. 6298 Rev. Statutes of 1881.

"Whenever, at any time during the year, any transient person shall locate in any township, city, town or village, and shall offer to sell or otherwise dispose of any books or other goods, wares or merchandise, under the name of a gift book store or any other name or designation, it shall be the duty of the proper Assessor for the time being, of the place where such person shall locate, forthwith to call upon such person and demand of him the true value in money of all his stock in trade; and in case such person shall neglect or refuse to return the same under oath within twenty-four hours after such demand, then it shall be the duty of said Assessor to determine the same as in other cases; and in either case he shall forthwith return such valuation to the Auditor of the county, who shall cause the same to be entered at once on the tax duplicate and collected immediately."

S. 31, Acts of 1891, p. 206.
S. 6314. Rev. Statutes of 1881.

The interrogatories which are and were a part of the schedule required to be made by the owner or holder of taxable personal property, for the purpose of assessment of the same for taxes:

"*Interrogatory One.* Are you or were you, on the first day of April, of the present year, the executor of the last will, or the administrator of the estate of any deceased person, or the guardian of the estate of any infant or person of unsound mind, or the trustee of the property of any person, or the receiver of any corporation, association or firm, or the agent or attorney or banker, investing, loaning or otherwise controlling the money or other property of any other person, resident in this State, or the president or accounting officer of any corporation, or a partner, consignee or pawnbroker? If yes, designate for whom you were then or are now acting in such representative or fiduciary capacity, and if you were, or are now, acting under the authority of any particular court, name the court, and also state to what court you report?"

"*Interrogatory Two.* Have you, before the first day of April of the present year, either personally or through the agency of others, caused all or any part of your taxable money or other property to be temporarily converted, either by sale, borrowing, exchange or in any other manner, into

United States notes not taxable, commonly called "greenbacks," or bonds or other securities of the United States not taxable, or any other property not taxable, with the intention to pay back, return or exchange, or sell back such property after you have made out your tax statement for the purpose of evading the payment of taxes on such property, or did you on or after the first day of April of the present year, and before you saw this interrogatory, pay back, return or re-exchange or sell back such property for the purpose aforesaid?"

S. 49, Acts of 1891, p. 211.
S. 6331, Rev. Statutes of 1881.

The heading of the list:

"Schedule of all property held by..... of.....Township.....County, Indiana, on the first day of April, 18....."

S. 53, Acts of 1891, p. 214.
S. 53, Amended Acts of 1895, p. 26.

The affidavit to the schedule:

"STATE OF INDIANA, ... COUNTY, SS:

"I, ..., being duly sworn, say to the best of my knowledge, information and belief, the foregoing statement contains a true, full and complete list of all property held or belonging to me, and dogs owned, kept or harbored by me, on the first day of April, including all personal property, appertaining to merchandising, whether held in actual possession or only having been purchased with a view to possession or profit, and all personal property appertaining to manufacturing, and all manufactured articles, whether on hand or owned by me, in all cases where I have been unable to exhibit certain classes of property to the Assessor, such property has been fully and fairly described, and its true condition and value represented. That I have in no case sought to mislead the Assessor, as to either quantity or quality or value of property, and that the deductions claimed from credits are *bona fide*, debts for a consideration received and do not consist in any part in bonds, notes or obligations of any kinds given to any insurance company on account of premium or policies, nor on account of any unpaid subscriptions to any literary, scientific or charitable in-

stitution or society, nor on account of any subscription to, or indebtedness payable on capital stock of any company, whether incorporated or unincorporated; and I further swear that since the first day of April of last year I have not directly or indirectly converted or exchanged any of my property temporarily, for the purpose of evading the assessment thereof for taxes, into non-taxable property or securities of any kind. I further swear that I have to the best of my knowledge and judgment valued said property at its true cash value, by which I mean the usual selling price, being the price which could be obtained for said property at private sale, and not at forced or auction sale."

"Subscribed and sworn to before me this .... day of ....., 18....

..... Assessor."

"By ..... Deputy."

Acts of 1895, pp. 28, 29.
Sec. 53, Acts of 1891, p. 217.
Sec. 6336, Rev. Statutes of 1881.

"All the property, both real and personal, situated in any county, shall be liable for the payment of all taxes, penalties, interest and costs charged to the owner thereof in such county, and no partial payment of any such taxes, penalties, interest of costs shall discharge or release any part or portion of such property until the whole is paid; which lien shall in nowise be affected or destroyed by any sale or transfer of any such personal property, and shall attach on the first day of April, annually, for the taxes of such year."

S. 173, Acts of 1891, p. 266.
S. 6447, Rev. Statutes of 1881.

"Whenever the County Auditor shall discover or receive credible information, or if he shall have reason to believe that any real or personal property has, from any cause, been omitted in whole or in part, in the assessment of any year or number of years, from the assessment book, or from the tax duplicate, he shall proceed to correct the tax duplicate and add such property thereto, with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes thereon, to enable him to do which, he is invested with all the powers of Assessor under this act."

S. 142, Acts of 1891, p. 257.

These statute laws of Indiana, by so many unequivocal reiterations, make it so clear that all liability of personal property to taxation, is restricted to the first day of April, and thereby all other days are rigorously excluded for that purpose, that no argument could make it plainer.

Acts of parties and finding and judgment of trial court regarding the Ohio notes, during the years 1887 to 1893, inclusive.

Nash desired to know if his Ohio agent was crediting his bank account, kept in Cincinnati, with all the collections on the Ohio notes, and, for that purpose, in the winters of 1883-4, ordered the Ohio agent to send the Ohio notes to his Indiana agent, who was directed to make memoranda of the facts shown by these notes in a book to be kept by him and return, monthly, such of them as would fall due in the following month to the Cincinnati agent for collection, who was to notify the Indiana agent of any payments made or of any renewals, and return any renewed notes to that agent to be held by him as before and make proper memoranda of the facts in the book kept by him.

Rec., pp. 653, 654, 655, 656, 657, 878, 999, 1000, 1001, 1002, 1042.

Some time before April 1, 1887, the Indiana agent notified Nash, if, thereafter, any Ohio notes were in his custody on the first day of April, he would list them for taxation with Nash's other property. Thereupon, by Nash's direction, all Ohio notes in the keeping of the Indiana agent were sent by him some days before the first day of April of each of the years 1887 to 1893, both inclusive, to the address of Nash in Cincinnati, Ohio, where they remained until a short time after the first day of

April of each of those years, when they were again returned to the Indiana agent.

Rec., pp. 1001, 1002, 1003, 1004, 1005, 1011, and 1018 and 1027, both, inclusive.

None of the Ohio notes were returned for taxation in Indiana and they were not assessed in that state for taxes until they were included in the assessment in controversy made May 7, 1895, by the auditor of Tippecanoe county.

Rec., p. 879.

Although not material, it is not improper to state that Nash's executors paid forty to fifty thousand dollars on account of taxes on the Ohio notes in Cincinnati.

Rec., pp. 156, 157, 163.

The sum of the Ohio notes in Indiana April 1 of each of the years 1884, 1885 and 1886 was $32,229.00, $98,131.00 and $129,885.00.

Rec., pp. 1033, 1034.

The trial court found and decreed that the following amounts of the Ohio notes were liable to assessment and assessed thereon the following sum of taxes and penalties for each of the years 1884 to 1893, both inclusive.

Year.	Ohio Notes.	Taxes.
1884	$32,329.08	$446.28
1885	98,131.00	1,229.26
1886	129,885.00	1,627.19
1887	198,612.00	2,488.21
1888	241,457.00	3,249.04
1889	221,599.00	3,470.23
1890	282,524.00	5,800.78
1891	311,944.00	6,006.79
1892	369,636.00	4,930.95
1893	309,858.00	7,008.98
Total	$2,095,975.08	$36,257.71

Rec., pp. 135, 136, 138, 139.

Thus it appears that $3,302.73 taxes were assessed for the years 1884, 1885 and 1886, when the Ohio notes were in Indiana on the first of April of each of the years; and that $32,954.98 were assessed on Ohio notes in Ohio on the first day of April for each of the years 1887 to 1893, both inclusive.

Discarding from view the single exception of goods brought into the state for sale by transient persons, as shown in section 31 of the acts of 1891, quoted above, it appears that the liability of personal property to asessment for taxes was strictly limited to that which was owned or held on the first day of April of each year, and, therefore, all such property owned by resident or non-resident on any other day of the year was not a material matter and could not have been a subject of assessment except as of that day.

"Assessments are made periodically, and in many of the States every year. The customary regulation is that the assessment shall be made or completed on a certain day, or that it shall be made as of a certain day. This fixes the liability of persons and property to taxation for the year."
1 Cooley on Taxation, 3d ed., pp. 604—605.

While, however, the statute provided, if any property had been omitted from the assessment of any year or years from the assessment book or tax duplicate, the auditor should add such omitted property to the tax duplicate with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes, it is manifest that the property must have been taxable on some prior first day of April, else it could not be said to have been omitted from the assessment and that since there is but one day on which property can be liable for taxation, the assessment by the auditor must

have been as of first of April of the year when it was omitted from the regular annual assessment.

The taxes assessed in this case were, therefore, assessed as of the first day of April of each of the years 1887 to 1893, inclusive, when the Ohio notes were without the boundaries of Indiana, and thereby the taxes assessed are void.

However, the Supreme Court of Indiana, while not attempting to deny the absence of the Ohio notes from that state on the first of April of those years, said they were nevertheless taxable for the reason that—

"Having held that the *situs* of the 'Ohio notes' was in Indiana, rather than Ohio, it must needs follow that the mere fact that they were sent out of the State each year to avoid having them here on assessment day can make no difference. The statute can not be thus avoided. *Dundee Co.* v. *School District* (C. C.) 19 Fed. 368; *Savings, etc., Society* v. *Multnomah County*, 169 U. S. 421, 18 Sup. Ct. 392, 42 I. Ed. 803; *Connecticut Co.* v. *Town of Munroe* (N. H.) 52 Alt. 942; *Webb* v. *John Hancock, etc. Co.* (Ind. Sup.) 69 N. E. 1006; *Voss* v. *Waterloo Water Co.* (Ind Sup.) 71 N. E. 208. It is the substantial possession to which the law looks, and this impression is not impaired by a mere temporary transfer. *Powell* v. *City of Madison*, 21 Ind. 340."

The court here has assumed as an unquestionable conclusion that the Ohio notes were *per se* taxable on the first day of April of the years in question, and determined, also, that the fact of their being in Ohio during that day made no difference.

It appears it made no reference to or examination of any of the tax laws, did not apparently regard the power of taxation exercised as dependent on legislative will, and the cited cases lend no support whatever to the point that the Ohio notes were taxable.

The cases of *Dundee Company* v. *School District*, 19

Fed. Rep. —, and *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421, questioned taxes assessed under the tax law of 1882 of Oregon.

The company and the society were non-residents of that state and had been loaning money in it to its citizens and receiving in return from them their notes secured by mortgage on land in Oregon. The notes and mortgages were assessed for taxes.

What the statute provided was concisely stated in the case in 169 U. S. 125:

"Taking all the provisions of the statute into consideration, its clear intent and effect are as follows: The personal obligation of the mortgagor to the mortgagee is not taxed at all. The mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee, not beyond their real cash value, and only so far as they represent an interest in the real estate mortgaged. The debt is not taxed separately, but only together with the mortgage; and is considered as independent within the State for no other purpose than to enable the mortgagor to deduct the amount thereof from the assessment upon him, in the same manner as other indebtedness within the State is deducted. And the mortgagee, as well as the mortgagor, is entitled to have deducted from his own assessment the amount of his indebtedness within the State.

"The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation. Nor is any such discrimination made between mortgagors and mortgagees, or between residents and non-resident mortgagees, as to deny to the latter the equal protection of the laws."

The thing taxed being the interest in lands mortgaged to the mortgagee, it was necessarily always in the state of Oregon, no question about the subject of taxation being beyond that state could arise; and the whereabouts of the notes and mortgages could not affect the taxable liability of the taxed interest, because it did not depend on those facts.

The Ohio notes were the things taxed; they were not within the jurisdiction of Indiana, neither was Nash, the debtors, or the owing property in the power of that state on the only day of the year when liability for taxation was possible. The absence of the Ohio notes, the things taxed, was material; in the cases cited the absence of the notes and mortgages, the things not taxed, was immaterial.

In the *Connecticut Val. Lumber Co.* v. *Town of Munroe* (N. H.), 52 Atl. 942, the company was a foreign corporation engaged in the manufacture of lumber at its mill in Munroe, and was doing business in that state, and was required by the statute to conform to the laws as to returns and taxation as domestic corporation. The court said:

> "The subject of taxation is 'stock in trade,' whether of merchants, shopkeepers, mechanics or tradesmen, employed in their trade or business; . . . . and, for the purpose of taxation, raw materials and manufactures of any manufactory, wood, timber, logs and lumber, manufactured or otherwise, ... shall be deemed stock in trade."

The company was taxed on its stock in trade April 1, 1901, and applied for an abatement of them on the ground that "they had no logs in their boom and no other stock in trade in Munroe April 1, 1901, nor at any time since." The court also said: "The tax is assessed, not upon the amount on hand April 1, but upon the amount employed in the trade or business, reckoned at its average value, except as bearing upon the question of the average amount employed in business, the amount on hand April 1, whether much or none at all, is immaterial, . . ."

There the things taxed were within the jurisdiction of the state of New Hampshire: the Ohio notes were not

in the jurisdiction of Indiana during the time demanded by its statute to make them taxable.

The case makes against the view of the court citing it.

The court, in *Webb* v. *John Hancock Ins. Co.* and *Voss* v. *Waterloo Water Co.*, had occasion to apply the rule that, when a statute or constitution prohibits the doing of any act, which otherwise would be lawful, the inhibition can not be successfully evaded by doing it indirectly.

The restraining law is the ground-work of the rule, they are complements of each other and the relevancy of the rule does not appear until the positive law is made known.

The Supreme Court of Indiana does not seem to rely on or refer to any statute.

There was no law of Indiana restraining the removal of the Ohio notes, nor any law making them liable to taxation on any day other than April 1, but conceding for an instant, that they were taxable property, if they were in that state on that day, it is manifest that it did make a difference that they were in the state of Ohio. The plaintiff in error invokes the statute law of Indiana on the subject, apparently; on the contrary, the court is unconsciously forcing an evasion of it.

Powell v. *Madison*, 21 Ind. 325, is cited to show that the possession of the Ohio notes by the Indiana agent made the notes taxable.

The charter of Madison fixed May as the time when personal property in it became liable for taxes, and provided that such property in the possession of an inhabitant should be assessed to him.

The applicants were pork packers in Madison and during the winters of 1861 and 1862 slaughtered, cured and packed meat of hogs of non-residents; the product was

held by the appellants subject to their order for delivery to them or shipment.

In May, 1862, the appellants were holding, in Madison, such products of non-residents subject to their order as stated, when it was assessed to the appellants for taxes; who, thereupon, sought to enjoin their collection. The court said: "But where the possession is of so permanent a character, and for so material a purpose as is involved in the slaughtering of hogs, salting and curing the meat, and holding the same until the owners ordered it shipped, or require a delivery to them, such possession, it seems to us, comes within the spirit and meaning of the law. We conclude that the property was taxable."

This tangible personal property, at the time specified by the statute to render it liable to taxation, was in Madison; this does make a difference, but does not show that the Ohio notes were liable, since they were out of the taxing jurisdiction.

Nash, being a non-resident and the absolute owner of the notes, had dominion over them; and, while owing no allegiance to the state of Indiana, he had the unquestioned right to send in and reclaim them from the jurisdiction of that state whenever it was his pleasure, and his motives for so doing are immaterial, because no immunities from or liabilities to taxation depend on them.

The Ohio notes, for the years now in question, were beyond the power of the state of Indiana, and $32,594.98 of the assessed taxes are void, and the enforcement of the payment out of the trust property would deprive the plaintiff in error of his property without due process of law.

3. The taxes assessed were assessed either on the personal right of Nash to reclaim his loaned money or on the property in Ohio owed to him, and, as both of these

properties were beyond the jurisdiction of the state of Indiana, the taxes are void.

This personal right was vested in Nash and was always with him.

Thorne v. *Watkins*, 2 Vesey, Sr., 1st ed., 35, 36;
Wilkins v. Ellett, 9 Wall. 740, 743.

Being his private property he could not have been divested of it, except by his voluntary act or by due process of law by a court of competent jurisdiction; and, therefore, a court having no jurisdiction over him could change its *situs*, because that would take it out of Nash; and being a non-resident it was never in Indiana, and thereby the taxes assessed, if any, on this right are void.

It is common knowledge that taxes assessed under the head of a note are never assessed, in fact, on the note itself, but are assessed on the value of the owing property which is applicable to its payment.

If the value of the owing property is equal to the amount named in the note, the assessment will or may be that amount; if, however, the value of the owing property only equals one-half of the amount of it the assessment will not exceed one-half of the amount of the note, and, lastly, if there is no property available or the maker is insolvent, there will be no assessment at all, and the note, although itself intact, is worthless.

Notes in practical affairs are not esteemed in and of themselves as appreciable property or desirable by any one, unless and then only so far as there is back of them money or property which, at least, can ultimately, by force of law, be appropriated to their payment.

Thus, we think, it appears that the assessment in this case, while nominally on the notes, was in reality on the owing money or property in Ohio, and, therefore, void,

and the collection of the taxes out of the trust property would deprive the plaintiff in error of his property without due process of law. *Railroad Co.* v. *Jackson*, 7 Wall. 262, 267; *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396, 397, 398.

The statute of Indiana expressly excludes from the category of taxable personal property the personal property of its inhabitants "actually and permanently invested in business in another state"; Nash kept his money continuously invested in an actual and permanent business of loaning, collecting and reloaning in Cincinnati, Ohio, for a period of more than thirty years prior to his death; that the assessment of the taxes in question on the Ohio notes was, on his investment in that state, and thereby this state situate without this state, except the property in error the equal protection of the laws, and the enforcement of their collection out of the trust funds would deprive him of his property without due process of law.

We repeat, for convenience, so much of section 4 of the Acts of 1891 heretofore set out, as covers the question here presented.

"Sec. 4. For the purpose of taxation real property shall include all lands, . . . personal property shall include all goods and chattels within this state . . . belonging to inhabitants of this state . . . ; all goods, chattels and effects belonging to an inhabitant in this state situate without the state, except the property actually and permanently invested in business in another state shall not be included." Acts of 1891, p. 199.

The court said this provision "merely represents an act of comity, by which this state yields in a measure its taxing power over the owner, to avoid double taxation, in a class of cases where, in all probability, the other state is taxing the business or property invested therein. To give appellant a standing to complain, assuming that

said section could in any circumstances offend against the provisions on which his counsel rely, it occurs to us that he ought to show that his decedent's property was liable to taxation elsewhere. It is not because Nash was a non-resident that we incline to the conclusion that the notes were subject to assessment in Indiana, but because the notes had a *situs* here."

The money of Nash, before it was loaned or invested in Ohio, and the invested property after it was loaned, were, it seems to us, manifestly equivalents of the same taxable value, and when the notes were paid the investment was converted into the money again. There had never been more or less taxable property, the only difference being that Nash's rights were attached or related to separate taxable things, at one time to the *res* as dollars and at another to the *res* as invested. So when his money was invested in the thing known as an actual and permanent business in another state of loaning, collecting and reloaning, there was only a different form of an equivalent taxable property at another time; the two did not coexist.

It appears quite plain that the written evidences of the contracts made by the parties, and by which the investments were created by acts of the parties and the law, were not the investments themselves, nor did they fix the *situs* of the invested property nor the value of the invested property, and in fact disassociated from that property they would be valueless and would never have been deemed taxable subjects saving in the case under review. If we are not mistaken, then, the assessment of taxes nominally made on the Ohio notes at their face value was in truth on the amount of the invested money owing Nash, and his interest in the lands in Ohio mortgaged to him; and thus they are void, because the *situs* of the taxed

property was beyond the jurisdiction of the state of Indiana.

If an inhabitant of Indiana had conducted and maintained a business of loaning and investing his money in Ohio, as Nash did, his investments would not have been taxable because prohibited by the express words of the quoted statutes, and taxation of the notes, taken in the course of such business, would have been taxation of his investments, for the reasons above stated, and, therefore, obnoxious to the rule that whatever is prohibited to be done by positive law can not be done indirectly. If this be correct the decision of the court below affirms the assessment, and collection of the taxes, and denies the plaintiff in error the equal protection of the laws, and deprives him of his trust property without due process of law.

The court below, while not questioning that Nash's Ohio business was of the statutory description or that the taxation of his notes was taxation of his invested property, held, nevertheless, that his notes were taxable on this ground: "It occurs to us that he (plaintiff in error) ought to show his decedent's property was liable to taxation elsewhere." The court thought that liability had not been shown, and the statute, thus judicially amended, did not apply, although the proof was that Nash's executors had paid $40,000 to $50,000 in Cincinnati as taxes officially demanded there. Rec., pp. 156, 157, 158, 163.

It is probable this court will not regard the matter of liability to or payment of taxes in Ohio as material.

The court below held that as taxable property which the statute purposely obliterated from the list of taxable things in Indiana; and, in so doing, we submit the court acted beyond its lawful powers, and that this is a proper subject of review by this court.

Taxes are impossible without legislative warrant, and

the exaction of taxes without it manifestly deprives the owner of property, which is the object of it, without due process of law, and in such a case this court has declared that it will not be conclusively bound by the decision of a state court upon a question of what is due process of law. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 111, 159.

Interpretation or construction of a statute is not permissible when its language is unequivocally plain and its intention is clear and destitute of any but one meaning; in such case the courts are bound to declare and follow implicitly the lawful fiat of the legislature.

In such case if the courts yield to any consideration that any policy or view they may have would be more expedient than that offered by the legislature and thereupon virtually amend, repeal or nullify the law, a gross abuse of power would happen, as has happened in the principal case.

The powers of government of Indiana are apportioned in three great divisions of the executive, legislative and judicial. These several powers are only exercisable by officers elected to discharge them, and the officers of each division are prohibited from taking upon themselves the performance of the functions vested in either of the departments to which they were not elected. The power of taxation being limited to the legislature, the judiciary has no part of it. Section 1, Article 10 of Constitution of Indiana, Revised Statutes 1881, p. 193.

While the courts have the undoubted power to declare tax laws void because repugnant to constitutional restraints, or interpret them when they require or admit of interpretation, they as undoubtedly overstep their powers when they read conditions or amendments in or out of a law whose intention is perfectly and clearly expressed.

"When, indeed, the language is not only plain, but

admits of but one meaning, the task of interpretation can hardly be said to arise (and 'those incidental rules which are mere aids, to be invoked when the meaning is clouded, are not to be regarded')."

"It is not allowable," says Vattel, "to interpret what has no need of interpretation. Absolute *sententia expositore non eget.* Such language best declares, without more, the intention of the law giver and is decisive of it. The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. (It is, therefore, only in the construction of statutes whose terms give rise to some ambiguity, or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language in order to give effect to what they suppose to have been the real intention of the law-makers.) Where the words of a statute are plainly expressive of an intent, not rendered dubious by the intent, the interpretation must conform to and carry out that intent. It matters not, in such case, what the consequences may be. It has, therefore, been distinctly stated, from early times down to the present day, that judges are not to mold the language of the statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardships, or of what in their view is right and reasonable or is prejudicial to society; are not to alter clear words, though the legislature may not have contemplated the consequences of using them; are not to tamper with words for the purpose of giving them a construction which is 'supposed to be more consonant with justice' than their ordinary meaning. Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous.

If the words go beyond what was probably the intention, effect must nevertheless be given to them."

"What is called the 'policy' of the government, with reference to any particular legislation, is said to be too unstable a foundation for the construction of a statute. The clear language of a statute can be neither restrained or extended by any consideration of supposed wisdom or policy. So long as a legislative enactment violates no constitutional provision or principle it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage."

Endlich on Interpretation of Statutes, sections 4 and 5;
1 Cooley on Taxation, 3d ed. 46.

Indiana Cases.

Until this case was decided the decisions of the Supreme Court of Indiana were all that unless these notes arose out of or were used in a business in Indiana they were non-taxable in that state.

The Indiana cases prior to *Buck* v. *Beach* hold that notes of a non-resgident were only taxable in that state in case they were given for money loaned and held for renewal or collection, with a view to reloaning the money by an agent in the same state, the business being permanently in the hands of the agent, or that the notes of a non-resident were themselves used in business in that state.

In *Herron, Treasurer*, v. *Keeran*, 59 Ind. 472-476 (1877), Keeran had been an inhabitant of Indiana and had acquired notes made by citizens of that state and bonds of an Indiana municipal corporation. He then became a citizen of Iowa, leaving the notes in the hands of attor-

neys to collect, and the bonds in the safe-keeping of a bank at his former residence in Indiana. They were assessed for taxes and he brought his suit to enjoin their collection and the court awarded the injunction and said, in substance:

> The statute included the property taxed, but the statute could not be taken in its broadest sense; that the general rule was that personal property was taxable at the owner's domicil, but the rule was departed from and the chattels were taxed at the place of their permanent *situs*, and that the same departure had been taken in regard to notes and evidences of debt in the hands of the agent of the owner who resided in another State or country, which notes had been taken for money loaned, and had been held for renewal or collection, with a view of reloaning the money by the agent in the same State, the business being permanently in the hands of the agent.
>
> "But such is not the case in judgment. Here the notes and accounts in the hands of the attorneys were left with them simply for collection and remission of the moneys collected to the owner in the State of his residence; and the bonds, on the change of his residence were temporarily left for safe-keeping, not permanently to be used in this State." The case was affirmed.

In *Forsman* v. *Burns*, 68 Ind. 247 (1879), Burns had been the agent in Indiana of a foreign corporation to negotiate loans in that state, according to an understanding between them, that the corporation would loan money to citizens of Indiana upon their obligations secured by mortgages on lands, reserving the right to approve, at its office in New York, the title and security, and, if it approved of them, it retained the securities and deposited the money for the loans in New York to the account of Burns as agent of the borrowers, who, in such cases, drew the money, deducted his commission, and paid the balance to the borrowers. These loans were assessed for taxes in the name of the agent. The taxes were held illegal and the court said:

"That all debts of every kind and nature, due from persons having a domicil in this State (of Indiana) to persons not having a domicil therein, on the day named in the statute, unless in the hands of an agent doing business in this State from which such debts have sprung, have no *situs* in this State, but have a *situs* where the creditor has his domicil and are not taxable in the State of Indiana."

In *Senour, Treasurer,* v. *Ruth,* 140 Ind. 318-320 (1894), Ruth, a non-resident, had been loaning money to citizens of Indiana and received therefor the notes of the borrowers, secured by mortgages on Indiana lands. The credits were assessed for taxes. A demurrer to Ruth's complaint to enjoin was sustained. On appeal the Supreme Court said:

"In the absence of a statute subjecting such property to taxation in this State, it has been frequently held not subject to taxation, . . . The principle upon which these cases have been decided is that such property is intangible, and its *situs* is at the place of residence of the owner. . . . Counsel cite Act of 1891 (Acts of 1891, Sec. 3, Subd. 4, Sec. 11, p. 199) as subjecting the property in question to taxation in this State. It is as follows: 'Section 3. All property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation.' 'Sec. 11. . . . *Fourth*—Personal property of non-residents of the State shall be assessed to the owner or to the person having control thereof in the township, town or city where the same may be, except that where such property is in transit to some place within the State, it shall be assessed in such place.' Expressly by the first of these provisions, and impliedly by the second, the authority is given to tax property within the jurisdiction of this State. The appellee's debtor and the property securing the debt are within the jurisdiction of the State, but the notes, the subject of the attempted taxation, and the appellee are not within the jurisdiction of this State, and authority for such taxation is not given."

The court cited the case of *Herron* v. *Keeran,* and quoted therefrom with approval, and added:

"After further consideration and citation of authorities

of those cases, it was said: 'Those cases all held that such property could not be so taxed, unless it has acquired, what we may denominate a business *situs*, in a State other than that of the residence of the owner. The property in the present case had acquired no such *situs*.' Every feature of that case presents a stronger claim for the exercise of the taxing power than the present. All that was said in that case applies to the present." The case was affirmed.

The case of *Buck* v. *Miller*, 147 Ind. 586 (1896), touched the assessment a part of which is now in question. The non-residence of Nash, and that the Ohio notes were made by non-residents was averred. The burden of the opinion is occupied with the question of their being liable to taxation in Indiana. The court denied that the mere fact that Nash and the makers of the Ohio notes were non-residents would exempt them from taxation, and said in substance if the notes had been kept and used in business in Indiana they would be taxable; that since it was not averred in that case that the notes had not been used in business or kept and used in business in Indiana at the several times when they should have been returned for taxation, the court would presume in favor of the action of auditor and presume that they were, and therefore the complaint was not sufficient. The court said:

"If, therefore, personal property is used in business in this State it will be assessed here, even though the owner may reside elsewhere; and this must be true of credits and moneys as well as other forms of personal property. A business may be done in buying and selling property and making loans and investments, collecting and reloaning money so used from year to year, and if the money, notes and mortgages so used are retained in this State they will be subject to taxation here as well as any other kind of personal property."

This case does not consider that the naked presence of the Ohio notes in Indiana made them taxable prop-

erty; but that fact coupled with the fact of using them in a business in Indiana would do so. It was not deemed in any of these Indiana cases that the mere physical presence of notes of a non-resident impressed such property with a taxable quality, but that they became such by the additional fact that they arose from, or were used in, an actual business of a more or less permanent character in this state. In *Buck* v. *Beach,* 164 Ind. 37 (1904), being the case at bar, the allegations and proof were that the Ohio notes had never been used in any business in Indiana, and arose out of Nash's loaning business in Ohio; and the court asserted a new doctrine, that the mere presence of the Ohio notes made them taxable property in Indiana. In other words, this case stands by itself in maintaining that notes arising out of business done in any other state by non-residents, and which had never been used in any business in Indiana, became, by the mere fact of their being written about and kept in a safe in Indiana, taxable property there.

The decision of the court below denies the plaintiff in error the equal protection of the laws and deprives him of his trust property without due process of law.

The plaintiff in error respectfully prays the court for judgment of reversal of the decision of the Supreme Court of Indiana, and for such other relief as may be just in the premises.

Lafayette, Indiana, April 18, 1906.

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